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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 ISREAL GARCIA-BORJA,

Case No. 3:18-cv-00573-RCJ-WGC

6 Petitioner,

7 v.

ORDER

8 ISIDRO BACA, et al.,

9 Respondents.

10 Petitioner Isreal Garcia-Borja, a Nevada prisoner, commenced this proceeding under 28
11 U.S.C. § 2254 by filing a *pro se* Petition for Writ of Habeas Corpus (ECF No. 6). This habeas
12 matter is before the Court on Respondents' Motion to Dismiss (ECF No. 12). Garcia-Borja did
13 not respond to this motion and the deadline for doing so has expired.¹ For the reasons discussed
14 below, Respondents' motion is granted in part and denied in part.

15 **BACKGROUND**

16 **I. STATE COURT PROCEEDINGS**

17 Garcia-Borja challenges a conviction and sentence imposed by the Second Judicial District
18 Court for Washoe County, Nevada ("state court"). In August 2012, Garcia-Borja entered a guilty
19 plea to three charges of attempted lewdness with a child under the age of fourteen. (ECF Nos.
20 16-3, 16-4.) On December 21, 2012, the state district court entered a judgment of conviction
21 sentencing Garcia-Borja on each count to consecutive sentences of imprisonment for a maximum
22 term of 240 months with a minimum parole eligibility of 96 months. (ECF No. 16-8.) Garcia-
23 Borja timely appealed.

24 In March 2013, while the direct appeal was pending, prosecutors filed a motion to correct

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26 ¹ LR 7-2 of the Local Rules of Civil Practice provides that failure to file points and authorities in opposition
27 to a motion constitutes a consent that the motion be granted. LR 7-2(d); *cf. Ghazali v. Moran*, 46 F.3d 52,
28 53 (9th Cir. 1995) (failure to follow the district court's local rules is a proper ground for dismissal). Pursuant to the Local Rules, any response to Respondents' motion was to be filed by March 22, 2019. *See* LR 7-2(b). Although no response was filed, the Court will address the merits of the motion to ensure a complete record.

1 illegal sentence seeking to amend Garcia-Borja's judgment by adding lifetime supervision—a
2 mandatory condition under NRS 176.0931. (ECF Nos. 16-18, 16-22.) Garcia-Borja did not oppose
3 the amendment. (*See* ECF No. 16-29.) The state court granted the motion and entered an amended
4 judgment of conviction including lifetime supervision on July 1, 2013. (ECF Nos. 16-29, 16-30.)

5 Garcia-Borja did not file a notice of appeal seeking to separately appeal the amended
6 judgment. The time to do so expired on July 31, 2013.

7 On September 19, 2013, the Nevada Supreme Court affirmed Garcia-Borja's conviction.
8 (ECF No. 16-31.) The time to seek certiorari review in the United States Supreme Court expired
9 on December 18, 2013.

10 After 169 days elapsed, Garcia-Borja filed a state petition for writ of habeas corpus ("state
11 petition") on June 6, 2014, seeking post-conviction relief.² (ECF No. 16-38.) Following an
12 evidentiary hearing, the state court denied the state petition. (ECF Nos. 17-23, 17-26.) Garcia-
13 Borja filed a post-conviction appeal. The Nevada Court of Appeals affirmed the state court's
14 denial of relief. (ECF No. 18-13.) Garcia-Borja sought rehearing but his request was denied. (ECF
15 No. 18-26.) A remittitur issued concluding the post-conviction appeal on August 21, 2018. (ECF
16 No. 18-27.)

17 **II. FEDERAL HABEAS PROCEEDINGS**

18 On or about November 28, 2018, Garcia-Borja mailed or handed to a prison official for the
19 purpose of mailing, the *pro se* federal petition for writ of habeas corpus initiating this case. (ECF
20 No. 6.) The federal petition raises three claims.

21 **DISCUSSION**

22 Respondents have moved to dismiss Garcia-Borja's petition as untimely and certain claims
23 as unexhausted.

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26 ² As discussed below, Respondents argue that Garcia-Borja's conviction became final when the time
27 expired for him to appeal the amended judgment, and the federal statute of limitations began running the
28 following day, August 1, 2013—not December 19, 2013, which is the day after time expired to file a petition
for certiorari challenging the outcome of the direct appeal. If calculated from August 1, 2013, 309 days
elapsed before Garcia-Borja filed his state petition. If calculated from December 19, 2013, 169 days elapsed
the state petition was filed.

1 **I. TIMELINESS**

2 **A. Legal Standard**

3 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) establishes a one-year
4 period of limitations for state prisoners to file a federal habeas petition pursuant to 28 U.S.C.
5 § 2254. The one-year limitation period, *i.e.*, 365 days, begins to run from the latest of four possible
6 triggering dates, with the most common being the date on which the petitioner’s judgment of
7 conviction became final by either the conclusion of direct appellate review or the expiration of the
8 time for seeking such review. 28 U.S.C. § 2244(d)(1)(A).

9 In Nevada, a petitioner has 30 days from the entry of a judgment of conviction to initiate a
10 direct appeal in the state appellate courts. Nev. R. App. P. 4(b). When no direct appeal is filed, a
11 judgment of conviction becomes final when the time for seeking such review expires. 28 U.S.C.
12 § 2244(d)(1)(A); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012). If a direct appeal was filed and
13 the state appellate court issues a ruling, the judgment of conviction becomes final for purposes of
14 § 2244(d) when the period for filing a petition for certiorari in the United States Supreme Court
15 expires. *Shannon v. Newland*, 410 F.3d 1083, 1086 (9th Cir. 2005). For Nevada convictions, a
16 petition for certiorari must be filed within 90 days after a Nevada appellate court enters judgment
17 or the Nevada Supreme Court denies discretionary review. *See* Sup. Ct. R. 13; *Harris v. Carter*,
18 515 F.3d 1051, 1053 n.1 (9th Cir. 2008).

19 Statutory tolling of the one-year time limitation occurs while a “properly filed” state post-
20 conviction proceeding or other collateral review is pending. 28 U.S.C. § 2244(d)(2).

21 **B. Analysis**

22 Respondents argue that Garcia-Borja is in custody pursuant to the *amended* judgment of
23 conviction entered by on July 1, 2013—not the *original* judgment of conviction entered on
24 December 21, 2012. (ECF No. 12.) Garcia-Borja had 30 days to file a direct appeal of the
25 amended judgment but did not do so. Respondents therefore contend that “his sentence became
26 final on July 31, 2013, at which time the AEDPA’s limitations period commenced to run.” (*Id.*
27 at 5.) They further allege that statutory tolling under § 2244(d)(2) does not apply for the pendency
28 of the direct appeal “because there was no petition or other collateral review ‘pending’ in the state

1 district court.” (*Id.*) Applying this rationale, 309 untolled days elapsed before Garcia-Borja filed
2 his state petition on June 6, 2014, leaving 56 days remaining until time expired under AEDPA.³
3 Respondents acknowledge that the AEDPA filing deadline was statutorily tolled until a remittitur
4 issued in the post-conviction appeal on August 21, 2018. Under Respondents’ theory, Garcia-
5 Borja’s AEDPA deadline was 56 days later on October 17, 2018. Because Garcia-Borja filed his
6 federal petition on November 28, 2018, Respondents claim the petition was filed approximately
7 six weeks after AEDPA’s statute of limitations expired. Accordingly, Respondents assert that the
8 petition is untimely and must be dismissed.

9 Respondents’ motion presents the question of whether, when a judgment of conviction is
10 amended during the pendency of a direct appeal from the original judgment, the AEDPA limitation
11 period starts running after the completion of the ongoing direct appeal proceedings or instead after
12 the expiration of the time to appeal the amended judgment, if no separate appeal is taken from the
13 amended judgment. If the AEDPA limitation period did not begin running until the day after the
14 December 18, 2013 expiration of the time to seek *certiorari* review of the Nevada Supreme Court’s
15 order of affirmance on direct appeal, then Garcia-Borja’s federal petition was timely. However, if
16 the AEDPA limitations period began to run after the August 1, 2013 expiration of the time to
17 appeal the amended judgment, as Respondents contend, then Garcia-Borja’s federal petition was
18 untimely.

19 In *Smith v. Williams*, 871 F.3d 684 (9th Cir. 2017), the Ninth Circuit held that § 2244(d)’s
20 one-year limitation period runs from the date of finality of the judgment of conviction under which
21 the petitioner then is being held. Applying this holding to the underlying facts of the case, the
22 *Smith* court found that the limitation period ran from the date of the amended judgment under
23 which the petitioner then was held, rather than from the date of the original judgment. 871 F.3d
24 at 688 (concluding that an amended judgment of conviction is considered a “new judgment,
25 starting a new one-year statute of limitations”). However, the amended judgment at issue in *Smith*
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27 ³ It appears that Respondents incorrectly calculated from the actual date of the event rather than the
28 following day in their motion. See Fed. R. Civ. P. 6(a); *Patterson v. Stewart*, 251 F.3d 1243, 1245–46 (9th
Cir. 2001). The correct calculations are applied to Respondents’ arguments in this order.

1 was filed years after completion of the direct appeal proceedings, which the petitioner timely
2 initiated following the original judgment. *See id.* at 685–86. *Smith* does not address situations
3 where an amended judgment is entered while a direct appeal is pending, which may cause the
4 amended judgment to become final and start the AEDPA clock long before the original judgment
5 if a petitioner does not specifically appeal the amended judgment, as is the case here.

6 U.S. District Judge Richard F. Boulware, II, recently addressed this exact scenario. *See*
7 *Posey v. Neven*, 2:15-cv-01482-RFB-EJY, 2019 WL 1284094 (D. Nev. Mar. 20, 2019), Order
8 (ECF No. 34). In *Posey*, the Court concluded that “the federal limitation period does not begin to
9 run in this procedural context until after the conclusion of review on the then-pending direct appeal
10 even if, *arguendo*, the amended judgment constituted a new intervening judgment for purposes of
11 AEDPA.” *Id.* at *3. The Court reasoned that the “amended judgment both practically and legally
12 was just as much under review on direct appeal as was the original judgment, given that both would
13 be subject to being vacated or modified by a full or partial reversal.” *Id.* at *4. Because no valid
14 policy interest is served “by starting the federal limitation period running while a petitioner’s direct
15 appeal from his conviction and sentence still is pending,” the holding in *Posey* “avoids a patently
16 absurd result that Congress clearly did not intend.” *Id.* The undersigned agrees with the rationale
17 and conclusion stated in *Posey*.

18 The Supreme Court has repeatedly declined to construe the federal habeas statutes in a
19 manner that creates a “gotcha” trap for the unwary. *See, e.g., Rose v. Lundy*, 455 U.S. 509, 520
20 (1982); *Rhines v. Weber*, 544 U.S. 269, 279 (2005) (Stevens, J., concurring). This Court also
21 declines to do so here. Pursuant to the plain language of § 2244(d)(1)(A), AEDPA’s limitation
22 period did not start until after the December 2013 expiration of the time to seek certiorari review
23 of the Nevada Supreme Court’s order of affirmance on direct appeal of Garcia-Borja’s original
24 judgment. Accordingly, the petition was timely and the motion to dismiss is denied as to this issue.

25 **II. EXHAUSTION**

26 **A. Legal Standard**

27 Pursuant to 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court
28 remedies on a claim before presenting that claim to the federal courts. This exhaustion requirement

1 ensures that the state courts, as a matter of comity, will have the first opportunity to address and
2 correct alleged violations of federal constitutional guarantees. *Coleman v. Thompson*, 501 U.S.
3 722, 731 (1991). “A petitioner has exhausted his federal claims when he has fully and fairly
4 presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing
5 *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999) (“Section 2254(c) requires only that state
6 prisoners give state courts a *fair* opportunity to act on their claims.”)). To satisfy the exhaustion
7 requirement, a claim must have been raised through one complete round of either direct appeal or
8 collateral proceedings to the highest state court level of review available. *O’Sullivan*, 526 U.S. at
9 844–45; *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Vang v. Nevada*, 329
10 F.3d 1069, 1075 (9th Cir. 2003). A properly exhausted claim “ ‘must include reference to a
11 specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner
12 to relief.’ ” *Woods*, 764 F.3d at 1129 (quoting *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996)).
13 Fair presentation therefore requires a petitioner to present the state courts with both the operative
14 facts and the federal legal theory upon which the claim is based. *Castillo v. McFadden*, 399 F.3d
15 993, 999 (9th Cir. 2005).

16 **B. Analysis**

17 Respondents contend that Grounds 1 and 3 of the petition are unexhausted. In Ground 1,
18 Garcia-Borja claims his Sixth and Fourteenth Amendment rights of due process and equal
19 protection were violated because the state court improperly participated in plea negotiations by
20 removing the parties’ stipulation from the negotiations. (*Id.* at 3–4.) In Ground 3, he alleges that
21 his Sixth and Fourteenth Amendment rights of due process and equal protection were violated
22 because the state court, prosecutors, and his counsel “colluded in ‘omission’,” *i.e.*, they failed to
23 inform Garcia-Borja that, if he accepted the plea agreement, he could be sentenced to more than a
24 maximum of two years per charge, consecutively, or a maximum of six years. (*Id.* at 7–8.) The
25 statement of exhaustion for each of these claims represents that Garcia-Borja raised the claims in
26 his state petition and on post-conviction appeal. (*Id.* at 4, 8.)

27 In his post-conviction appeal before the Nevada Court of Appeals, Garcia-Borja alleged
28 one claim for ineffective assistance of counsel (“IAC”) under *Strickland v. Washington*, 466 U.S.

668 (1984):

The district court erred in dismissing the Petition, and in applying the forty (40) percent rule to negate the substantial evidence in the record that Appellant plead guilty in reliance on trial counsel and the district court's statements that Appellant was facing a maximum term of six (6) to sixty (60) years in prison by pleading guilty to three (3) counts of Attempted Lewdness with a Child Under the Age of Fourteen Years.

(ECF No. 18-8 at 16.⁴)

The Court's review of the record indicates that Grounds 1 and 3 are not exhausted. The only claim Garcia-Borja raised in his post-conviction appeal was an IAC claim (*id.* at 16–19), which aligns with the IAC claim now alleged in Ground 2 of the petition.⁵ Grounds 1 and 3 are substantive claims—not IAC claims. Garcia-Borja did not present Grounds 1 and 3 to the Nevada Supreme Court on direct appeal or to the Nevada Court of Appeals on post-conviction appeal. Although the petition represents that Grounds 1 and 3 were raised in Garcia-Borja's post-conviction appeal, his appellate brief asserted only that counsel was ineffective for failing to properly advise him regarding the potential sentence under the plea agreement. He did not assert substantive claims for violations of his due process and Sixth and Fourteenth Amendment rights of due process and equal protection. Exhaustion of an IAC claim does not exhaust the underlying substantive claim. *See Rose v. Palmateer*, 395 F.3d 1108, 1111–12 (9th Cir. 2005). Thus, while Garcia-Borja's IAC claim related to counsel's advice in relation to the plea agreement is exhausted, his substantive claims are not. Grounds 1 and 3 are therefore unexhausted.

III. OPTIONS ON A MIXED PETITION

A federal court may not entertain a habeas petition unless the petitioner has exhausted all available and adequate state court remedies for all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed petition” containing both exhausted and unexhausted claims is subject

⁴ Although the petition does not allege exhaustion through the direct appeal, the Court has reviewed Garcia-Borja's appellate brief and found that it does not exhaust Grounds 1 or 3. On direct appeal, Garcia-Borja raised one issue: whether the Nevada Supreme Court should remand the matter back to the state court to allow him the opportunity to withdraw his guilty plea post-sentencing. (ECF No. 16-27 at 4.)

⁵ In Ground 2, Garcia-Borja pleads a Sixth Amendment IAC claim based on trial counsel's purported misrepresentations of the potential sentence under the plea agreement. (ECF No. 6 at 5–6.)

1 to dismissal. *Id.* Because Garcia-Borja's petition is mixed, he has these options: (1) file a motion
2 to dismiss seeking partial dismissal of only the unexhausted claims, and proceed only on the
3 exhausted claims; (2) file a motion to dismiss the entire petition without prejudice in order to return
4 to state court and exhaust the unexhausted claims; and/or (3) file a motion for other appropriate
5 relief, such as a motion for a stay and abeyance asking this Court to hold his exhausted claims in
6 abeyance while he returns to state court to exhaust the unexhausted claims.

7 With respect to the third option, a court has discretion to stay a petition that it may validly
8 consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276 (2005). But a stay and abeyance is
9 only granted if a petitioner can show that his unexhausted claims are not "plainly meritless" and
10 there is good cause for his failure to exhaust those claims in state court. *Id.* at 277. If Garcia-Borja
11 wishes to ask for a stay, he must file a motion for stay and abeyance, demonstrating these two
12 requirements. Respondents will then have an opportunity to respond, and Garcia-Borja to reply.

13 Garcia-Borja's failure to choose any of the three options listed above, or seek other
14 appropriate relief from this Court, will result in his federal habeas petition being dismissed.
15 Garcia-Borja is also advised to familiarize himself with the limitations periods for filing federal
16 habeas petitions contained in 28 U.S.C. § 2244(d), because those limitations periods may have a
17 direct and substantial effect on whatever choice he makes regarding his petition.

18 **IT IS THEREFORE ORDERED:**

19 1. Respondents' Motion to Dismiss (ECF No. 12) is GRANTED IN PART AND
20 DENIED IN PART.

21 2. Grounds 1 and 3 are UNEXHAUSTED in their entirety.

22 3. Within 30 days of the date of this order, Petitioner Isreal Garcia-Borja must either:

23 a. File a motion to dismiss seeking partial dismissal of only the unexhausted
24 claims (Grounds 1 and 3);

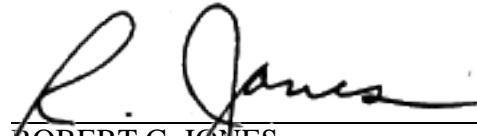
25 b. File a motion to dismiss the entire petition without prejudice in order to return
26 to state court to exhaust the unexhausted claims (Grounds 1 and 3); and/or

27 c. File a motion for other appropriate relief, such as a motion for a stay and
28 abeyance asking this Court to hold his exhausted claims in abeyance while he

1 returns to state court to exhaust the unexhausted claims.

- 2 4. Garcia-Borja's failure to timely comply with this order will result in the dismissal
3 of his petition without further advanced notice.

4 DATED this 23rd day of December, 2019.

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7 ROBERT C. JONES
8 UNITED STATES DISTRICT JUDGE
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